

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

NO. 77-7027

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-7027

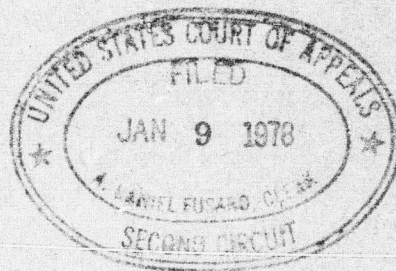
JAMES D. McMILLEN,

Plaintiff-Appellant,

- against -

LOUIS J. LEFKOWITZ, Individually, and
as the ATTORNEY GENERAL of the STATE
OF NEW YORK,

Defendant-Appellee.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE LOUIS J. LEFKOWITZ,
ATTORNEY GENERAL OF THE STATE OF
NEW YORK

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TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Issues Presented for Review	2
Statement of the Case	3
Statutes Involved	12
Argument:	
There was a total failure of the plaintiff's burden to prove that the Attorney General violated any of plaintiff's Federally- protected rights. No evidence was presented during the trial on which reasonable men could differ. The District Court correctly granted the Attorney General's motion for a directed verdict.	15
Conclusion	26

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
Adickes v. Kress & Co., 398 U.S. 144 (1970)	15
Black v. United States, 534 F. 2d 524 (2d Cir., 1976) . .	16
Imbler v. Pachtman, 424 U.S. 409 (1976).	21, 23
Johnson v. Glick, 481 F. 2d 1028 (2d Cir., 1973), cert. den. 414 U.S. 1033	16
Paul v. Davis, 424 U.S. 693 (1976)	21
Scheuer v. Rhodes, 416 U.S. 232 (1974)	23
Simblest v. Maynard, 427 F. 2d 1 (2d Cir., 1970)	25
United States v. Miller, 425 U.S. 435 (1976)	19
Williams v. Vincent, 508 F. 2d 541 (2d Cir., 1974) . . .	16
<u>The Constitution of the United States</u>	
Fourth Amendment	3, 17
Fourteenth Amendment	17, 20
<u>United States Statutes</u>	
42 U.S.C. § 1983	1, 3, 17, 21
<u>New York Statutes</u>	
N.Y. Business Corporations Law, § 1101(a)(2)	22
N.Y. Education Law, § 6512	10, 13
N.Y. Education Law, § 6513	14
N.Y. Education Law, § 6521	14, 22
N.Y. Education Law, § 6522	14
N.Y. Education Law, § 7601	14
N.Y. Executive Law, § 60	15
N.Y. Executive Law, § 62	15
N.Y. Executive Law, § 63	12, 15, 22
N.Y. General Business Law, § 349	12, 22
N.Y. General Business Law, § 350	13, 22

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Preliminary Statement

This is an appeal by the plaintiff from a judgment of the United States District Court for the Northern District of New York (FOLEY, J.) which granted a motion for a directed verdict against the plaintiff and dismissed his complaint. In this action the plaintiff sought to recover damages in the amount of \$7,000,000 for alleged violation of his civil rights by the defendant pursuant to 42 U.S.C. § 1983.

The motion for a directed verdict was first made at the close of the plaintiff's case at which time the District Court reserved decision. The motion was then renewed after the conclusion of the proof. The District Court granted the motion finding that on the evidence presented, reasonable men could reach but one conclusion -- that the defendant did not violate any of the plaintiff's civil rights.

Issues Presented for Review

1. In a civil rights action for monetary damages against a State officer, can the plaintiff rely on the acts of defendant's employees, where the defendant is not shown to have either knowledge of or directed the acts?

The Court below said no.

2. In a civil rights action, where the plaintiff fails to prove that a right secured by the Constitution or laws of the United States was violated, should a motion for a directed verdict be granted?

The Court below granted the motion for a directed verdict.

3. In a civil rights action where the plaintiff fails to prove that the defendant did not have a reasonable basis for his acts and did not act in good faith, is the defendant immune from suit?

The Court below did not address this question.

Statement of the Case

A. Nature of the Case

The plaintiff brought this action pursuant to 42 U.S.C. § 1983. In this action the plaintiff claimed that the defendant, Louis J. Lefkowitz, the Attorney General of the State of New York, individually, violated his civil rights. The plaintiff did not include any employees of the New York State Attorney General's staff as defendants, but sought recovery of monetary damages solely against the Attorney General, Louis J. Lefkowitz*.

The plaintiff's case against the Attorney General centers on the investigation by the Attorney General's office of complaints made to the Attorney General about plaintiff's business activities. The plaintiff contends, that in conducting this investigation, the Attorney General violated his civil rights. Throughout the trial in the District Court and in his brief to this Court, the plaintiff has been vague about precisely identifying what rights he claims were violated and explaining how they were violated. It is apparently the plaintiff's theory that his right to be free from unreasonable searches and seizures (U.S. Const., Fourth Amendment) was violated (1) by the "seizure" of certain books and records from a Sandra Cadan on January 17, 1975, and (2) by the "search" of a file in the offices of Therapeutic Hypnosis, Inc. (a corporation

*The plaintiff also included the State of New York as a defendant, but dismissal against the State was granted prior to trial by an Order of the District Court (PORT, J.) and plaintiff did not appeal from that Order.

formed by the plaintiff) in Schenectady, New York on February 14, 1975. The plaintiff apparently also contends that his right to "due process" was violated by the issuance of "false" statements about his business activities.

B. The Plaintiff's Business Activities

The plaintiff came to Schenectady, New York in 1972 and commenced a hypnosis business. He incorporated this business in 1973 under the name Therapeutic Hypnosis, Inc. (382)*. In this business, the plaintiff used the title "Doctor" on his office door and on various brochures advertising his services, despite the fact that he was not a medical doctor and held no legitimate doctor's degree nor any other college degree (500). The plaintiff displayed on his office wall a certificate which purported to award him a "Doctor of Metaphysical Sciences" degree from the University of Eastern Florida. The University of Eastern Florida, Inc. is in fact a non-academic business which sells these certificates as novelty items (520). The plaintiff purchased his for \$30 (467).

The plaintiff treated people for various ailments, including frigidity, impotency, hives, vomiting, coughing and obesity (505, 508). The plaintiff established 19 branch offices in other cities in the State of New York and in other states (326). On April 17, 1975 the Internal Revenue Service went to the Schenectady, New York office of the plaintiff's corporation and proceeded to seize \$1,385 in cash pursuant to a tax lien (453). Upon learning of this, the

*Numbers in parentheses refer to pages in the transcript of the trial in the District Court unless otherwise indicated.

plaintiff booked passage on a ship and went to Europe (428). He never returned to his corporate offices.

While in Europe the plaintiff sent a letter to the Attorney General stating that he felt that the Attorney General's actions were unconscionable and that the plaintiff would devote the rest of his life to vindicating himself (428).

C. The Investigation Into the Plaintiff's Business Activities

The Consumer Frauds Unit in the Albany, New York office of the Department of Law received its first complaints about the plaintiff's activities in September, 1972 (352). Subsequently other complaints were received over the next three years. These complaints were investigated and culminated in the criminal and civil prosecutions set forth infra. The investigations were primarily handled by Assistant Attorney General George A. Cushing and Senior Investigator John A. Neuberger, both employees of the Department of Law assigned to the Consumer Frauds Unit in the Albany office (248, 351). These two employees worked under the supervision of Frank A. Pantalone, Assistant Attorney General in Charge of the Consumer Frauds Unit of the Albany office (243).

On March 5, 1975 an advertisement placed by the plaintiff appeared in the New York Times (see Exhibit A at an unnumbered page of the Appendix). This advertisement contained a litany of complaints about the investigation into plaintiff's business activities. On March 5, 1975 the Attorney General called Assistant Attorney General Pantalone and asked whether he had seen the advertisement in the

New York Times and whether an investigation was being conducted of Therapeutic Hypnosis, Inc. (574). The Attorney General requested Mr. Pantalone to send an immediate report (574). On March 5, 1975 Mr. Pantalone sent a three-page memorandum summarizing the investigation (574).

In a subsequent telephone call to Mr. Pantalone, the Attorney General directed that the file be reviewed and that all complaints concerning the unauthorized practice of medicine be referred to the Education Bureau of the Department of Law; that all material relating to violations of the Tax Law and Labor Law be referred to the appropriate State agencies; and that Mr. Pantalone's bureau begin to prepare an appropriate petition, affidavits and exhibits for a proceeding pursuant to Executive Law § 63(12) (575). On March 4, 1975 Assistant Attorney General Cushing sent a memorandum to the Attorney General summarizing the investigation to date (555; the memorandum is set forth as Exhibit G at an unnumbered page of the Appendix). This was done after he was told by an employee of Therapeutic Hypnosis, Inc. that the advertisement would appear in the New York Times (554). Mr. Cushing and Investigator Neuberger had no personal communications with the Attorney General about this investigation (520, 554).

The plaintiff's complaints about the investigation appear to center around these occurrences:

- (1) The January 17, 1975 "seizure" of material.

On January 17, 1975 Assistant Attorney General Cushing was advised by a Sandra Cadan that she had records in her possession that she wanted to turn over to Mr Cushing (280). Mrs. Cadan told Mr. Cushing that the records were her property (280) and that they related to the business affairs of the plaintiff and Therapeutic Hypnosis, Inc. Mrs. Cadan agreed to turn the material over to Mr. Cushing (284-285).

Mr. Cushing advised Mrs. Cadan that a subpoena would be served on her at the time this material was picked up (279-280). Pursuant to his arrangement, Investigator Neuberger went to Mrs. Cadan's home, served her with the subpoena and picked up one or two boxes full of material (363-364). Included in this box of material were four appointment books which listed people who visited the offices of the plaintiff and Therapeutic Hypnosis (363). These appointment books were used to develop further investigative leads and in the course of the criminal prosecution against the plaintiff (368-369, 287, 293).

(2) The February 14, 1975 "search" of files.

The testimony produced by the plaintiff was conflicting in this area. Essentially, it was his claim that agents of the Attorney General's office searched through the drawer of a filing cabinet located in the reception area of the offices of Therapeutic Hypnosis, Inc. located in Schenectady, New York.

On February 14, 1975 Assistant Attorney General Cushing received information that the plaintiff was planning to remove his

records and the records of Therapeutic Hypnosis from the State (361). Accordingly, Mr. Cushing prepared a subpoena duces tecum and he and Investigator Neuberger went to the Schenectady offices of Therapeutic Hypnosis, Inc. to serve the subpoena (371). Upon entering the office Mr. Neuberger told the receptionist he wanted to see the plaintiff (372). The receptionist left the room and returned in less than a minute with a Stephen Martin, who stated that he was an officer of Therapeutic Hypnosis, Inc. and that the plaintiff was out of town (372). Mr. Neuberger served Mr. Martin with the subpoena. Mr. Martin asked Mr. Neuberger and Mr. Cushing to wait (372). Mr. Cushing and Mr. Neuberger waited in the reception area with the receptionist for a period of between five and ten minutes (372). Thereafter, they were requested by Mr. Martin to step into the plaintiff's office to speak with the plaintiff, who was not after all out of town (372).

The plaintiff said that he would not comply with the subpoena because it was unreasonable (398)*. He further said that it was physically impossible for him to comply because some of the material was out of town and the remainder was at the accountants, Peat, Marwick, Mitchell and Co. (399). Mr. Cushing and Mr. Neuberger then left the offices of Therapeutic Hypnosis, Inc. (399).

* The subpoena was subsequently withdrawn at the request of the plaintiff's attorney (221). On February 14, 1975 another subpoena duces tecum was served on the accountants, Peat, Marwick, Mitchell and Company (223). Although a motion was made to quash the subpoena, the plaintiff, through his attorneys stipulated to comply with the subpoena (227, 232).

Morris Wainio, a former employee of Therapeutic Hypnosis, Inc., testified that he was sitting in a back office of Therapeutic Hypnosis, Inc. on February 14, 1977 and saw Mr. Neuberger go over to a file cabinet in the waiting room, open the drawer and begin thumbing through it (207). He further said that Mr. Neuberger did not remove anything from the file drawer and did not take any notes as he thumbed through it (206-208). Mr. Wainio did not ask Mr. Neuberger to stop looking through the file drawer (205).

Kenneth Klejbuk, also a former employee of Therapeutic Hypnosis, Inc. testified that on February 14, 1975 he was sitting in a back office about 30 to 40 feet away from the reception area and saw Mr. Cushing open a file drawer and begin leafing through it (329, 335). He also saw Mr. Cushing look at some clipboards that were hanging on the wall (329). Mr. Klejbuk was positive that it was Mr. Cushing who was leafing through the file drawer and not Mr. Neuberger (337). Mr. Klejbuk did not say that he asked Mr. Cushing to stop and did not see Mr. Cushing remove any material from the file (331, 337). The entire incident did not last very long according to Mr. Klejbuk (336).

The record contains no evidence as to what information was obtained as a result of this "search" or as to whether or how this information was subsequently used against him. Both Mr. Cushing and Mr. Neuberger denied ever looking through any file drawers or clipboards in the offices of Therapeutic Hypnosis, Inc. (310, 318, 373).

(3) Giving "false" information in the Internal Revenue Service.

Barbara Herdman, who was a Revenue Officer for the Internal Revenue Service testified that she was given information by the Attorney General's office that there was reason to believe there was \$30,000 in cash in a safe in the offices of Therapeutic Hypnosis, Inc. in Schenectady, New York (452, 453). She went to the offices of Therapeutic Hypnosis, Inc. on April 17, 1975 and seized \$1,385 in cash pursuant to a Federal tax lien (453).

No evidence was produced to show that the Attorney General's office did not in fact have reason to believe that there was cash in a safe in the offices of Therapeutic Hypnosis, Inc.

D. The Civil and Criminal Prosecutions Against the Plaintiff

The investigations resulted in both criminal and civil prosecutions against the plaintiff.

The plaintiff was indicted by the Grand Jury, Schenectady County, on 26 misdemeanor counts of practicing medicine without a license*. At trial before the County Court, Schenectady County, 20 of the counts were dismissed by the Court. The jury returned a not guilty verdict on the remaining six counts.

*New York Education Law, § 6512.

The civil prosecution was a special proceeding for an injunction commenced on August 5, 1975 in New York State Supreme Court, Albany County. Following modification of an earlier judgment on appeal, the proceeding resulted in a judgment being granted against the plaintiff, the two corporations and officers and employees of the corporations.* The judgment (set forth at pp. 173-178 of Plaintiff's Appendix) dissolved the corporations and enjoined the plaintiff from continuing his fraudulent and illegal business activities. The judgment further directed that the plaintiff pay \$2,000 in costs to the State of New York and to deposit the sum of \$500 with the Attorney General of the State of New York to be used to reimburse persons aggrieved by the fraudulent and illegal acts of the plaintiff. On appeal this judgment was affirmed (57 A D 2d 979 [1977]) and plaintiff's motion for permission to appeal to the New York State Court of Appeals was denied (42 N Y 2d 807 [1977]). The plaintiff has not made the payments directed by the judgment and accordingly is now in default.

*The judgment initially granted was modified on appeal to permit the corporations to obtain an attorney and to give notice that the proceeding could be treated in a summary manner if no factual issue is found to exist. This decision by the Appellate Division, Third Department is reported at 52 A D 2d 1017.

Statutes Involved

New York Executive Law

"§ 63. General duties

* * *

"12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct.

"In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules."

New York General Business Law

"§ 349. Deceptive acts and practices unlawful

"(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

"(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

"(c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest."

"§ 350. False advertising unlawful

"False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful."

New York Education Law

"§ 6512. Unauthorized practice a crime

"Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled, or who aids or abets an unlicensed person to practice a profession, or who fraudulently

sells, files, furnishes, obtains, or who attempts fraudulently to sell, file, furnish or obtain any diploma, license, record or permit purporting to authorize the practice of a profession, shall be guilty of a class A misdemeanor."

"§ 6513. Unauthorized use of a professional title a crime

"Anyone not authorized to use a professional title regulated by this title, and who uses such professional title, shall be guilty of a class A misdemeanor."

"§ 6521. Definition of practice of medicine.

"The practice of the profession of medicine is defined as diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition."

"§ 6522. Practice of medicine and use of title 'physician'

"Only a person licensed or otherwise authorized under this article shall practice medicine or use the title 'physician'."

"§ 7601. Use of title 'psychologist'

"Only a person licensed under this article shall be authorized to use the title 'psychologist' or to describe his services by use of the words 'psychologist', 'psychology' or 'psychological' in connection with his practice".

ARGUMENT

THERE WAS A TOTAL FAILURE OF THE PLAINTIFF'S BURDEN TO PROVE THAT THE ATTORNEY GENERAL VIOLATED ANY OF PLAINTIFF'S FEDERALLY-PROTECTED RIGHTS. NO EVIDENCE WAS PRESENTED DURING THE TRIAL ON WHICH REASONABLE MEN COULD DIFFER. THE DISTRICT COURT CORRECTLY GRANTED THE ATTORNEY GENERAL'S MOTION FOR A DIRECTED VERDICT.

In this Civil Rights Action brought pursuant to 42 U.S.C., § 1983, the burden was on the plaintiff to show that specific actions of the Attorney General deprived him of a right secured by the Constitution and laws of the United States. (Adickes v. Kress & Co., 398 U. S. 144, 150 [1970].) There was a total failure by the plaintiff to discharge this burden.

(A)

The record is barren of any proof that the Attorney General was personally responsible for any action against the plaintiff.

The defendant as the Attorney General of the State of New York is the head of the Department of Law (N.Y. Executive Law, § 60). To assist him in performing the many duties required by law,^{*} the Attorney General is empowered to appoint assistants^{**} and other employees. Since plaintiff seeks monetary damages in this action pursuant to 42 U.S.C., § 1983, the general doctrine of respondeat superior is insufficient to make out a prima facie case.

^{*} See, N.Y. Executive Law, § 63.

^{**} See, N.Y. Executive Law, § 62.

The plaintiff must in addition prove personal responsibility of the Attorney General for the conduct of his employees (Williams v. Vincent, 508 F. 2d 541, 546 [2d Cir., 1974]; Johnson v. Glick, 481 F. 2d 1028, 1034 [2d Cir., 1973], cert. den. 414 U.S. 1033; Black v. United States, 534 F. 2d 524, 527-528 [2d Cir., 1976]).

The personal responsibility necessary to make out a prima facie case is illustrated by this Court's decision in Johnson v. Glick, supra. In that case the plaintiff, an inmate at the House of Detention alleged that he was the victim of an unprovoked attack by a prison guard. He further alleged that he sustained physical injuries as a result of the attack and that the guard refused his requests for medical attention for an unwarranted period of time. The plaintiff sought recovery against the guard and the warden. In affirming the dismissal of the complaint against the warden, this Court wrote (481 F. 2d at p. 1034):

"Here the complaint alleged only that Warden Glick was in charge of all the correctional officers employed at the House of Detention. It did not allege that the warden had authorized the officer's conduct, see Martinez v. Mancusi, supra, 443 F.2d at 924, or even that there had been a history of previous episodes requiring the warden to take therapeutic action, cf. Wright v. McMann, supra, 460 F.2d at 134-135; it alleged a single spontaneous incident, unforeseen and unforeseeable by higher authority."

In the instant case there was a total failure of proof as to any personal responsibility of the Attorney General. The incidents plaintiff complains about occurred on January 17, 1975,

February 14, 1975 and April 17, 1975. There was no showing that the Attorney General directed the employees' conduct on these dates or that he even knew about it. In addition there was no showing of a history of previous episodes which required corrective action by the Attorney General. The record is barren of any proof of these required elements. The plaintiff failed to prove that the Attorney General was personally responsible for the acts of his employees about which plaintiff complains.

(B)

Moreover, the record is barren of any proof that a right secured to the plaintiff by the Constitution or laws of the United States was violated.

It was not the purpose of 42 U.S.C. 1983 to make a Federal forum available for the redress of all complaints a citizen may harbor against public officials. A plaintiff must show that a right secured by the Constitution or laws of the United States was violated.

It is apparently plaintiff's contention that his right to be free from illegal searches and seizures (U.S. Const., Fourth Amendment) was violated by (1) the "seizure" of certain books and records from a Sandra Cadan on January 17, 1975 and (2) by the "search" of a file in the offices of Therapeutic Hypnosis, Inc. in Schenectady, N.Y. on February 14, 1975. The plaintiff also argues that his right to "due process" (U.S. Const., Fourteenth Amendment) was violated when the Attorney General's employees issued "false" statements about

the plaintiff's business activities. The record is barren of proof that any of these occurrences violated any Federally-protected right of the plaintiff.

With respect to the "seizure" of books and records from Sandra Cadan on January 17, 1975, the record shows that there was in fact no seizure of records from Mrs. Cadan. The record shows that Mrs. Cadan voluntarily turned these records over to the Attorney General's office. Mrs. Cadan contacted Assistant Attorney General Cushing and told him she had some books and records relating to the business affairs of the plaintiff and Therapeutic Hypnosis, Inc. that she wanted to turn over to Mr. Cushing (280). She told Mr. Cushing that these records were her property (280) and agreed to give the material to Mr. Cushing (284-285).

The plaintiff further argues that the subpoena served on Mrs. Cadan made the transaction an illegal seizure because the subpoena directed Mrs. Cadan to turn this material over to the Attorney General's office. This subpoena did nothing more than reduce to writing the agreement already made by Mrs. Cadan to turn over this material (284-285). The subpoena's use under these circumstances was probably superfluous and unnecessary, but in any event it did not convert this episode into an illegal seizure. Where material in the possession and control of a third party is voluntarily shown to investigators by the third party or is obtained through service of a subpoena on the third party,

there is no intrusion into Fourth Amendment rights (United States v. Miller, 425 U.S. 435, 443-445 [1976]).

In addition to failing to prove that the Attorney General had a personal responsibility for this episode, the plaintiff failed to prove that any Federally-protected right was violated.

With respect to the "search" of the offices of Therapeutic Hypnosis on February 14, 1975: The plaintiff failed to prove that there was in fact an illegal search. It is apparently plaintiff's argument that a search took place when one of the Attorney General's employees went over to a file cabinet in the reception area of Therapeutic Hypnosis, Inc.; opened the top drawer and began leafing through it. On this point the plaintiff presented the testimony of two former employees (207, 329). Both were seated in back offices (207, 329, 335). One testified that it was Investigator Neuberger who opened the file drawer (206). The other testified that it was not Mr. Neuberger but it was Assistant Attorney General Cushing who opened the file drawer (329, 335). Both testified that they did not ask the person they said was looking through the file cabinet to stop (205, 337). The plaintiff never produced the receptionist who was in the reception area when the file drawer was supposedly opened. The plaintiff called as his witnesses, Mr. Neuberger and Mr. Cushing, both of whom denied ever opening a file drawer and could not remember even seeing a file cabinet in the reception area (310, 318, 373).

The plaintiff's former employees further testified that the person they supposedly saw leafing through a file drawer did so only for a brief period of time (336); did not remove anything from the drawer (208, 331); and did not take notes on the contents (206). No proof was offered by the plaintiff on what was in the file drawer; that the contents were his as opposed to belonging to Therapeutic Hypnosis, Inc; what information was supposedly obtained; and how the information was used against him.

The record contains insufficient evidence to conclude that a search of plaintiff's property took place on February 14, 1975 as the plaintiff argues. In addition the plaintiff also failed to show that the Attorney General was personally responsible for actions of his employees during this episode.

With respect to plaintiff's argument that "false" statements were made by the Attorney General's employees in violation of his right to due process (U.S. Const., Fourteenth Amendment): The "false" statement plaintiff complains about was brought out during the trial in testimony by an Internal Revenue Service employee, Barbara Herdman, called by the plaintiff. Miss Herdman, who was a Revenue Officer, testified* (452-453):

"On April 17, 1975, I received a telephone call from the New York State Attorney General's Office providing me with the information that there was reason to believe that over thirty thousand dollars in cash was available in the corporate office's safe." (Emphasis supplied.)

* Miss Herdman testified pursuant to limited permission of the Commissioner of Internal Revenue. Her testimony was restricted to material set forth in an affidavit filed in defense of another action pending in the District Court which the plaintiff brought against Miss Herdman (445-449).

The IRS went to the offices of Therapeutic Hypnosis, Inc. on April 17, 1975 and seized \$1385 in cash (453). It is apparently plaintiff's reasoning that since \$30,000 was not found, the information provided by the Attorney General's office was false. The plaintiff completely ignores the words "reason to believe" and offers no proof to show that the Attorney General's office did not in fact have good faith reason to believe \$30,000 was in the offices of Therapeutic Hypnosis, Inc. at the time this information was given to the IRS.

Moreover, plaintiff did not show how this violated any federally protected right or any harm which flowed from this seizure. Certainly plaintiff has no federally protected right to hide or divert money from the payment of valid Federal tax liens. Plaintiff's vague claims that "due process" has been violated by statements made by the Attorney General's office does not state a cognizable claim under 42 U.S.C. 1983 (Paul v. Davis, 424 U.S. 693 [1976]).

(C)

THE RECORD IS BARREN OF ANY PROOF THAT
DEFENDANT ACTED OUTSIDE THE SCOPE OF
PROSECUTORIAL IMMUNITY OR EXECUTIVE
IMMUNITY AFFORDED THEM AGAINST SUIT
UNDER 42 U.S.C. § 1983.

In Imbler v. Pachtman, 424 U.S. 409, 431 (1976) the Court held that a State prosecutor is immune from a civil suit for damages under 42 U.S.C. § 1983 in initiating a criminal prosecution and in presenting the State's case. Accordingly, the

Attorney General is afforded absolute immunity in initiating and presenting the criminal prosecution against the plaintiff. It is submitted that the same public policy considerations that warrant granting immunity to the prosecutor in initiating and prosecuting a criminal case also extends to the civil prosecution against the plaintiff to enjoin him from continuing to engage in deceptive, fraudulent and illegal activities in the State of New York. The civil prosecution was authorized and was brought pursuant to N.Y. Executive Law, § 63(12)* which provides:

"12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the State of New York, to the supreme court of the state of New York, * * * for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, * * *." (Emphasis supplied.)

The purpose of the civil prosecution was to enforce the laws of the State of New York. The same considerations which warrant immunity for law enforcement proceedings brought in the criminal context apply to law enforcement proceedings

* In addition to violations under N.Y. Executive Law, § 63(12), violations of the following statutes were also prosecuted: N.Y. General Business Law, §§ 349, 350; Business Corporation Laws § 1101(a)(2); N.Y. Education Law, § 6521 (see Petition at pages 158-171 of the Appendix).

brought in the civil context. In Imbler v. Pachtman, 424 U.S. 409, 423 (1976) the Court wrote:

"* * * These [considerations] include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." (Material in brackets supplied.)

In addition to the prosecutorial immunity afforded the Attorney General, at least for the initiation and presentation of both the criminal and civil proceedings against the plaintiff, the Attorney General is also afforded a qualified immunity as an executive officer during the investigatory stage.* This immunity was described by the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 247-248 (1974):

"These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

* It is possible that prosecutorial immunity extends also to all or some phases of the investigatory stage. The Supreme Court in Imbler v. Pachtman, 424 U.S. 409 (1976) noted the dual nature of the prosecutor's job in that it sometimes required him to act as an administrator while at other times it required him to act as a prosecutor. The Court stated that drawing the line between where the administrator's duties stop and the prosecutor's duties begin is difficult and not necessary to reach their decision (Id. p. 431, footnote 33).

Accordingly, in order to establish that the Attorney General acted outside the scope of this immunity, it was incumbent on the plaintiff to prove that (1) there were no reasonable grounds for the Attorney General's actions during the investigatory phase and (2) that these actions were made without a good-faith belief that they were lawful and would not violate the constitutional rights of the plaintiff. There was a total failure of proof on these elements.*

As discussed, supra, the doctrine of respondeat superior cannot be used to establish acts by the Attorney General. The plaintiff cannot rely on the acts of the Attorney General's employees, but must show what the Attorney General actually did and that there was no reasonable basis for the action and the Attorney General did not act in good faith. The record is barren of any such proof.

* The plaintiff conceded that there was probable cause to investigate him (477, 505-506).

(D)

THE DISTRICT COURT CORRECTLY GRANTED THE ATTORNEY GENERAL'S MOTION FOR A DIRECTED VERDICT.

Where the plaintiff fails to present any evidence to establish the elements of a prima facie case, a directed verdict is properly granted against him. Likewise where the facts and inferences to be drawn from the facts point so strongly in favor of one party that the Court believes that reasonable men could not come to a different conclusion, a motion for a directed verdict is properly granted. (Moore's Federal Practice, vol. 5a, § 50.02[1]; Simblest v. Maynard, 427 F 2d 1 [2d Cir., 1970])

There is no evidence in the record here on which reasonable men could conclude that any acts of the Attorney General deprived the plaintiff of any right secured to him by the Constitution or Laws of the United States. Accordingly, the District Court properly granted the Attorney General's motion for a directed verdict.

Moreover, the rulings by the District Court objected to by the plaintiff on this appeal were all rulings within the discretion of the Court. The plaintiff has shown no abuse of discretion by the District Court and has shown no resulting harm or prejudice from the rulings. The plaintiff received a fair and impartial trial and had every opportunity to present evidence on the material issues in this case, which he simply failed to do.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: January 5, 1978

Respectfully submitted,

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AFFIDAVIT OF SERVICE

James Douglas McMillen,

vs.

Louis J. Lefkowitz

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:
I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the defendant-appellee herein.

On the 6th day of January 1978 I served
the annexed brief upon the
person XXXXXX named below, by depositing three copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said person ~~attorney~~ at the
address within the State respectively theretofore designated by
him for that purpose as follows:

James D. McMillen, Pro Se
5325 Sanders Road
Toledo, Ohio 43615

Sworn to before me this

6th day of January 1978

Beverly J. Smith

Ralph D. Camardo
RALPH D. CAMARDO
Notary Public, State of New York
No. 4618149
Qualified in Albany County
Commission Expires March 30, 1979

